

THE ATTORNEY GUARDIAN

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THE ATTORNEY GUARDIAN

I. INTRODUCTION

The purpose of this paper is to give an overview of the first 30 days after an attorney is appointed guardian of the person and estate of an incapacitated person. This article will discuss the procedural aspects of the attorney guardian, the challenging aspects of the attorney guardian, and the problem solving aspects of the attorney guardian. This article focuses on the basics and the practicalities of the attorney guardian experience during the first 30 days of appointment as guardian of the person and estate of an incapacitated person.

II. FUNDAMENTALS OF THE ATTORNEY GUARDIAN

A judge appoints you the Guardian of the Person and Estate of An Incapacitated Person. What's your first step? Carefully read the Order.

Attorney Guardians should read the order so that they know, among other things, if the Ward has been determined to be totally or partial incapacity. If the Order shows that the Ward has been determined to be partially incapacitated, the Order should also show the powers retained by the Ward. Attorney guardians should also read the order so that they know if the appointment is for temporary or permanent guardianship. If the attorney is appointed temporary guardian, the attorney should look to the order for such things as the length of the temporary guardianship, the powers of the temporary guardian, and whether the temporary guardianship is contested. However, before the court appointed attorney guardian can begin acting as guardian, he or she must qualify.

A. Qualification

§ 699. How Guardians Qualify

A guardian is deemed to have duly qualified when the guardian has taken and filed the oath required under Section 700 of this code, has made the required bond, and has filed it with the clerk, and has the bond approved by the judge. A guardian who is not required to make bond, is deemed to have duly qualified when the guardian has taken and filed the required oath. Tex. Prob. Code § 699.

1. Bond and Oath

§ 700. Oath of Guardian

- (a) The guardian shall take an oath to discharge faithfully the duties of guardian for the person or estate, or both, of a ward.*
- (b) A representative of the Department of Aging and Disability Services shall take the oath required by Subsection (a) of this section if the department is appointed guardian. Tex. Prob. Code § 700.*

Pursuant to Texas Probate Code Section 702, a guardian of the estate must be bonded unless the guardian is a corporate fiduciary or a county guardianship program.

As a practical matter, once the attorney guardian receives an order appointing him or her Guardian of the Person and Estate, the attorney guardian should forward the Order to a bonding company as soon as possible and request a bond. The Order should state the amount of the bond.

Generally, the attorney guardian will pick up the bond at the bonding company's office. The attorney guardian should sign the bond, have the surety sign the bond as well, and the bond should be notarized. Generally the bond has an oath attached to it and the attorney guardian can sign the requisite oath on the same document. Please see Section 704 of the Texas Probate Code for the form of the bond. The attorney guardian may have to pay for the bond premium out of his or her own pocket¹. The amount of the bond premium depends on the amount of the bond. The guardian of the estate cannot open an estate bank account and pay the bond premium from guardianship estate funds until the requirements of Texas Probate Code Section 699 have occurred.

The attorney guardian should look at the date the order was signed because pursuant to Section 701 of the Texas Probate Code, there is a 20 day period to qualify.

§ 701. Time for Taking Oath and Giving Bond

Except as provided by Section 682(A)(a) of this code, the oath of a guardian may be taken and subscribed, or the bond of a guardian may be given and approved, at any time before the expiration of the 20th day after the date of the order granting letters of guardianship or before the

¹The attorney guardian can be reimbursed for payment of bond premiums from guardianship estate funds without a court order pursuant to Texas Probate Code § 774(b)(6).

letters have been revoked for a failure to qualify within the time allowed. An oath may be taken before any person authorized to administer oaths under the laws of this state. Tex. Prob. Code §701.

2. Judge's Approval

§ 705. Bond to be Filed

A bond required under this chapter shall be subscribed by the principals and sureties, and shall be filed with the clerk when approved by the court. Tex. Prob. Code § 705.

Once the attorney guardian has contacted the surety and forwarded the order, been approved for the amount of the bond, and physically taken him or herself to the bondsman's office to have the surety sign and notarize the bond with the oath attached to it, then the attorney guardian must personally deliver the signed and notarized bond to the court for the judge's approval.

3. Order Letters

After the bond is approved by the judge, the bond should be filed at the clerk's office and Letters of Guardianship should be ordered. (Certificates of Appointment of Temporary Guardianship should be ordered for Temporary Guardianships Pursuant to Section 876 of the Texas Probate Code.) I recommend ordering ten Letters of Guardianship. As a practical matter, keep a twenty dollar bill with you when traveling to the clerk's office because in most counties, Letters of Guardianship are \$2.00 each, which totals \$20.00.

B. Locate Ward

As soon as the attorney guardian qualifies as guardian of the person and estate of an incapacitated person, the guardian has a duty to protect the ward's person and property. Every case is unique. Some Wards are already placed in a nursing home prior to qualification and you know where they are located. On the other hand, in some cases family members, friends, and/or neighbors, hide the Ward from you. Someone hiding your Ward will obviously make locating your Ward more difficult. But, even if the ward is easy to locate, your ward may be experiencing some difficulty with guardianship and so it's important to visit with the ward and discuss the changes in his or her life.

1. Review Court Documents

Whether you know the location of your Ward or not, review the court documents after being appointed the guardian of an incapacitated person because it's important to gather as much information as possible. Review documents such as the Guardianship Application, Guardian Ad Litem Report, Court Investigator's Report, any contested pleadings, the doctor's letter, and the APS Report. Other court appointed attorneys on the case generally have valuable information and will share that information with the court appointed guardian for the benefit of the Ward.

2. Speak with Family, Friends, and Neighbors

Introduce yourself to the ward's family, friends, and neighbors. If the Harris County Guardianship Program and/or APS was/is involved in the guardianship, contact them as well.

3. Gather information from health care facilities

Health care facilities may have information. If your new ward spent some time in a medical facility, take the time to speak with the staff, especially the social workers.

C. Gathering Financial Information

Gathering a Ward's financial information can be very time consuming because a newly appointed guardian of the estate does not always know exactly where all his or her Ward's financial assets are located. Sometimes we don't even know if our new Ward has any financial assets. Generally I start with the mail.

1. Mail

Forward your ward's mail as soon as possible. You can pick up a change of address form at a post office. Your Ward's mail is a good starting point to assist you in locating assets. Look for bank statements, invoices for property taxes, invoices for insurance premiums, and anything else that will lead you to your Ward's assets.

2. Review Pleadings, Speak with Financial Advisors, and CPA's

While attempting to gather financial information, court pleadings may contain helpful leads.

If you can find the contact information of financial advisors, cpa's, or both, that may be helpful as well. Request tax returns from accountants to assist you with locating assets. If your ward has not filed any tax returns recently, you should contact an accountant as soon as possible.

3. Opening a Guardianship Account

Opening a guardianship account can be time consuming. Plan on spending some time at the bank. Remember to bring your letters of Guardianship, your Ward's social security number, and date of birth.

III.

CHALLENGING ASPECTS OF THE ATTORNEY GUARDIAN

A. Procedure-the first 30 days

Procedurally there is a lot of work to be done the first 30 days of a guardianship. For example, notices must be given, an inventory must be drafted, and the guardian must submit a reasonable allowance request to the court. Because some procedures in guardianships differ from those in administrations, I recommend keeping guardianship forms separate from administration forms.

1. Notice

§ 783. Notice by Guardian of Appointment

- (a) *Within one month after receiving letters, personal representatives of estates shall send to the comptroller of public accounts by certified or registered mail if the Ward remitted or should have remitted taxes administered by the comptroller of public accounts and publish in some newspaper, printed in the county where the letters were issued, if there be one, a notice requiring all persons having a claim against the estate being administered to present the claim within the time prescribed by law. The notice must include the time of issuance of letters held by the representative, the address to which a claim may be presented, and an instruction of the representative's choice that a claim be addressed in care of the representative, in the care of the representative's attorney, or in the care of "Representative, Estate of _____." (naming the estate).*
- (b) *A copy of the printed notice, with the affidavit of the publisher, duly sworn to and subscribed before a proper officer, to the effect that the notice as published as provided in this chapter for the service of citation or notice by publication, shall be filed in the court in which the cause is pending.*

- (c) *When no newspaper is printed in the county, the notice shall be posted and the return made and filed as required by this chapter. Tex. Prob. Code § 783(a).*

As a practical matter, most attorneys in Harris County use the Daily Court Review to give Notice to Unknown Creditors and request that they send the publisher's affidavit to the courthouse for filing.

2. Inventory and Monthly Allowance

Within the first 30 days of appointment, an Inventory, Appraisement, and List of Claims must be filed with the court and that is not a lot of time to secure an accurate description of an estate. It may be necessary to supplement or amend your inventory as the case progresses. The Inventory is very important for many reasons. For example, when the time comes to draft the first annual account, the guardian of the estate, and the court, will look to the Inventory for the amounts of the ward's assets on the guardian's qualification date. Also, the court will look to the Inventory to decide whether to increase or decrease the guardian's bond.

§ 729. *Inventory and Appraisement*

- (a) *Not later than the 30th day after the date the guardian of the estate qualifies as guardian, unless a longer time is granted by the court, the guardian of the estate shall file with the clerk of the court a verified, full, and detailed inventory, in one written instrument, of all the property of the ward that has come into the guardian's possession or knowledge. The inventory filed by the guardian under this section must include:*
- (1) *all real property of the ward that is located in this state; and*
 - (2) *all personal property of the ward wherever located.*
 - (b) *The guardian shall set out in the inventory the guardian's appraisement of the fair market value of each item of the property on the date of the grant of letters of guardianship. If the court appoints an appraiser of the estate, the guardian shall determine the fair market value of each item of the inventory with the assistance of the appraiser and shall set out in the inventory the appraisement made by the appraiser.*
 - (c) *An inventory made under this section must specify:*
 - (1) *what portion of the property is separate property and what portion is community owned by the ward.*
 - (2) *If any of the property is owned in common with other persons, the interest owned by the ward.*
 - (d) *The inventory, when approved by the court and duly filed with the clerk of court, is for purposes of this chapter the inventory and appraisement of the estate referred to in this chapter.*

- (e) *The court for good cause shown may require the filing of the inventory and appraisal at a time no later than the 30th day after the date of qualification of the guardian. Tex. Prob. Code § 729.*

The purpose of the inventory is not only to list assets of an estate. Claims owed to the Ward's Estate should be listed on the Inventory as well. Unfortunately, there are people who are taking advantage of the elderly and many times the discovery of financial exploitation leads to the guardianship of an incapacitated person. In the claims section of the Inventory, the guardian of the estate should always place any claims the guardianship estate may have against any person or entity that has wrongfully mishandled the Ward's Estate.

§ 730. List of Claims

The guardian shall make and attach to an inventory under Section 729 of this code a full and complete list of all claims due or owing to the ward that must state:

- (1) the name of each person indebted to the ward and the address of the person if known;*
- (2) the nature of the debt, whether it is a note, bill, bond, or other written obligation or whether it is an account or verbal contract;*
- (3) the date of the indebtedness and the date when the debt is or was due;*
- (4) the amount of each claim, the rate of interest on each claim, and time for which the claim bears interest; and*
- (5) what portion of the claim is held in common with others, and the interest of the estate in the claim. Tex. Prob. Code § 730.*

After the guardian of the estate has completed the inventory, the attorney guardian can look at the ward's assets, compare the assets with the ward's income, if any, and the ward's monthly expenses, and begin working on a monthly or annual allowance for the ward.

§ 776. Amounts Allowable for Education and Maintenance of Ward

- (a) Subject to Section 777 of this code, if a monthly allowance for the ward was not ordered in the court's order appointing a guardian, the guardian of the estate shall file an application with the court requesting a monthly allowance to be expended from the income and corpus of the ward's estate for the education and maintenance of the ward and the maintenance of the ward's property.*
- (a-1) The guardian must file the application requesting the monthly allowance not later than the 30th day after the date on which the guardian qualifies as guardian or the date specified by the court, whichever is later. The application must clearly separate amounts requested for education and maintenance of the ward from amounts requested for maintenance of the ward's property.*
- (a-2) In determining the amount of the monthly allowance for the ward and the ward's*

property, the court shall consider the condition of the estate and the income and corpus of the estate necessary to pay the reasonably anticipated regular education and maintenance expenses of the ward and maintenance expenses of the ward's property. The court's order setting a monthly allowance must specify the types of expenditures the guardian may make on a monthly basis for the ward or the ward's property. An order setting a monthly allowance does not affect the guardian's duty to account for expenditures of the allowance in the annual account required by section 741 of this code.

- (a-3) When different persons have the guardianship of the person and estate of a ward, the court's order setting a monthly allowance must specify the amount, if any, set by the court for the education and maintenance of the ward that the guardian of the estate shall pay and the amount, if any, the guardian of the estate shall pay to the guardian of the person, at a time specified by the court, for the education and maintenance of the ward. If the guardian of the estate fails to pay to the guardian of the person the monthly allowance set by the court, the guardian of the estate shall be compelled to make the payment by court order after the guardian is duly cited to appear.*
- (b) When a guardian has in good faith expended funds from the income and corpus of the estate of the ward for support and maintenance of the ward and the expenditures exceed the monthly allowance authorized by the court, the guardian shall file a motion with the court requesting approval of the expenditures. The court may approve the excess expenditures if:*
 - (1) the expenditures were made when it was not convenient or possible for the guardian to first secure court approval;*
 - (2) the proof is clear and convincing that the expenditures were reasonable and proper;*
 - (3) the court would have granted authority in advance to make the expenditures; and*
 - (4) the ward received the benefits of the expenditures. Tex. Prob. Code § 776.*

3. Appraisers and Selling R/P and P/P

Prior to selling real property, the attorney should file an application to appoint an appraiser prior to the court, on it's own motion, appointing an appraiser.

Generally, average personal property isn't appraised and the attorney guardian should keep the ward's best interests in mind when considering selling property.

B. Placement of Ward

1. What can the Ward Afford?

What can your Ward afford? What does your Ward want? What does your Ward need? If your Ward's Estate consists of assets in the millions, then there is a very high probability that your Ward can have what he or she wants and have his or her needs met. For example, if your Ward

wants to live in his or her home, your Ward can live in the home and you can hire 24/7 care. Not all estates can afford 24/7 care and many incapacitated people must relocate to nursing homes. As guardian of the person and estate, one of your many duties, depending on the situation of your Ward at the time you qualify, will be to assess appropriate placement of the ward.

2. Hiring Care Assessment Managers

Navigating between the different nursing homes can be frustrating because each nursing home has an admissions process and many times they will send a representative to evaluate the ward prior to admittance. Additionally, a lot of paperwork is involved with admitting a Ward into a nursing home and the paperwork may attempt to make the attorney guardian personally liable. Some attorney guardians hire care assessment managers to assist them. There are many different aspects to guardianship that must be overseen such as home health care workers, nursing homes, care-givers, and healthcare facilities. A competent care assessment manager will be able to assist the guardian with making the right decisions for your ward and following up with the health care professionals.

3. Hiring Medicare/Medicaid Attorneys

There may come a time when your Ward becomes eligible for medicaid and/or medicare. Most probably you should speak with an attorney familiar with medicaid and/or medicare regarding the best course of action for your ward.

C. Fees

Assuming there are assets to pay for legal and guardianship fees in the ward's estate, it's important to file the right applications at the right time to receive compensation for work done. Pursuant to Section 665D of the Texas Probate Code and the Harris County Probate Standards for Court Approval of Attorney Fee Petitions approved by all four Harris County Probate judges, there is a difference between what the attorney guardian can charge for "legal" work and "guardianship" work.

§ 665D. Compensation and Payment of Attorney's Fees of Attorney Serving as Guardian

- (a) Notwithstanding any other provision of this subpart, an attorney who serves as guardian and who also provides legal services in connection with the guardianship is not entitled to compensation for the guardianship services or payment of attorney's fees for the legal services from the ward's estate or other funds available for that purpose unless the attorney files with the court a detailed description of the services performed that identifies which of the services provided were guardianship services and which were legal services.*
- (b) An attorney described by Subsection (a) of this section is not entitled to payment of attorney's fees for guardianship services that are not legal services.*
- (c) The court shall set the compensation of an attorney described by Subsection (a) of this section for the performance of guardianship services in accordance with Section 665 of this code. The court shall set attorney's fees for an attorney described by Subsection (a) of this section for legal services provided in accordance with Sections 665A, 665B, and 666 of this code. Tex. Prob. Code §665D*

1. Legal Fees

The Harris County Probate Courts' approved standards for attorney's fees can be found on the Harris County Clerk's website. In general, attorney's fees for legal work include drafting pleadings, reviewing court documents, and reviewing contracts such as nursing home contracts and bank account contracts. The first page of the Harris County fee standards sets out the hourly rate for attorney's fees, which is based on experience in practicing probate and guardianship law, not the number of years you have been an attorney. As a practical matter, check with the court regarding the appropriate time to file an Application for Attorney's Fees and remember to include a detailed invoice and an Attorney Fee Affidavit.

2. Guardianship Fees

The Harris County Probate Courts' approved standards for attorney's fees also discusses guardianship or fiduciary fees, which includes paying the ward's monthly bills, visiting your ward, receipt and review of your ward's mail, and telephone conferences with your ward's family members and health care professionals. In Harris County, these fiduciary activities cannot be billed for more than \$100.00 an hour. The attorney guardian should also check with the court regarding the appropriate time to file the Application for Fiduciary Fees, with an attached invoice and Fee

Affidavit. If it is a hardship to wait to file the Application for Payment of Fiduciaries Fees, the attorney guardian should consider discussing a hardship request with the court.

3. Section 665 Fees-the 5% rule

§ 665. *Compensation of Guardians and Temporary Guardians*

- (a) *The court may authorize compensation for a guardian or a temporary guardian serving as a guardian of the person alone from available funds of the ward's estate or other funds available for that purpose. The court may set the compensation in an amount not exceeding five percent of the ward's gross income.*
- (a-1) *In determining whether to authorize compensation for a guardian under this section, the court shall consider the ward's monthly income from all sources and whether the ward receives medical assistance under the state Medicaid program.*
- (b) *The guardian or temporary guardian of an estate is entitled to reasonable compensation on application to the court at the time the court approves any annual accounting or final accounting filed by the guardian or temporary guardian under this chapter. A fee of five percent of the gross income of the ward's estate and five percent of all money paid out of the estate, subject to the award of an additional amount under Subsection (c) of this section following a review under Subsection (c)(1) of this section, is considered reasonable under this subsection if the court finds that the guardian or temporary guardian has taken care of and managed the estate in compliance with the standards of this chapter.*
- (c) *On application of an interested person or on its own motion, the court may:*
 - (1) *review and modify the amount of compensation authorized under Subsection (a) or (b) of this section if the court finds that the amount is unreasonably low when considering the services rendered as guardian or temporary guardian; and*
 - (2) *authorize compensation for the guardian or temporary guardian in an estimated amount the court finds reasonable that is to be paid on a quarterly basis before the guardian or temporary guardian files an annual or final accounting if the court finds that delaying the payment of compensation until the guardian or temporary guardian files an accounting would create a hardship for the guardian or temporary guardian.*
- (d) *A finding of unreasonably low compensation may not be established under Subsection (c) of this section solely because the amount of compensation may not be established under usual and customary charges of the person or entity serving as guardian or temporary guardian. A court that authorizes payment of estimated quarterly compensation under Subsection (c) of this section may later reduce or eliminate the guardian's or temporary guardian's compensation if, on review of an annual or final accounting or otherwise, the court finds that the guardian's compensation if, on review of an annual or final accounting or otherwise, the court finds that the guardian or temporary guardian:*
 - (1) *received compensation in excess of the amount permitted under this section;*
 - (2) *has not adequately performed the duties required of a guardian or temporary guardian under this chapter; or*
 - (3) *has been removed for cause.*
- (d-1) *If a court reduces or eliminates a guardian's or temporary guardian's compensation as provided by Subsection (d) of this section, the guardian or temporary guardian and the surety on the guardian's or temporary guardian's bond are liable to the*

- guardianship estate for any excess compensation received.*
- (e) *The court, on application of an interested person or on its own motion, may deny a fee authorized under this section in whole, or in part, if:*
 - (1) *the court finds that the guardian or temporary guardian has not adequately performed the duties required of a guardian or temporary guardian under this chapter, or*
 - (2) *the guardian or temporary guardian has been removed for cause.*
 - (f) *Except as provided by Subsection (c) of this section for a fee that is determined by the court to be unreasonably low, the aggregate fee of the guardian of the person and the guardian of the estate may not exceed an amount equal to five percent of the gross income of the ward's estate plus five percent of all money paid out of the estate.*
 - (g) *If the estate of a ward is insufficient to pay for the services of a private professional guardian or a licensed attorney serving as guardian of the ward's person, the court may authorize compensation for that guardian if funds in the county treasury are budgeted for that purpose.*
 - (h) *In this section:*
 - (1) *"Gross income" does not include Department of Veterans Affairs or Social Security benefits received by a ward.*
 - (2) *"Money paid out" does not include any money loaned, invested, or paid over on the settlement of the guardianship or a tax-motivated gift made by the ward. Tex. Prob. Code § 665.*

IV. PROBLEM SOLVING

A. Locating Documents

As I mentioned earlier in this article, it's important to forward the ward's mail to your office, but don't wait for the mail to come in to begin locating documents. Try to find your ward's mail that has already been delivered. If your ward has personal belongings in a home, look for banks statements, Wills, directives to physicians, funeral policies, and any other documents that will assist you with your duties as guardian.

Your ward's personal belongings may be in a storage unit or the home of a family member. Ask your ward if there is anything he or she would like to have because you should not only secure the ward's personal property, but look through the items. It's not unheard of for people to hide jewelry in coat pockets and cash inside mattresses.

Look for safe deposit box information such as box numbers and keys. Contents of safe deposit boxes should be secured as soon as possible. Every bank your ward has a bank account at

should be asked for information on any other accounts including safe deposit boxes and accounts that have been closed.

B. Locating Ward's Relatives

It is not uncommon at the beginning of a guardianship to lack information on the ward's relatives. The attorney guardian may not know if the ward has children or siblings. It's very important to make an effort to locate the ward's family. Speak with neighbors, doctors, financial advisors, accounts, staff at healthcare facilities, local church groups, and anyone else you can find in the ward's life.

C. Wishes of the Ward

Working with an incapacitated person can be delicate at times for a variety of reasons. It's important to keep in mind the wishes of your ward and to keep in contact with the people your ward knew prior to incapacity. If you hear from a neighbor, encourage the neighbor to visit your ward in the hospital or nursing home. Little things like that go a long way.

Locating documents and loved ones generally helps the attorney guardian with an understanding of the ward's wishes prior to incapacity.

V. CONCLUSION

If an attorney was appointed the guardian of the person and estate of an incapacitated person, there's a reason a family member, friend, or loved one wasn't appointed. Attorneys should take their duties and responsibilities as guardians very seriously. Wards are relying on guardians for their well being. This article is not all inclusive, but is hopefully a good starting point for the first 30 days of an attorney's appointment as guardian of the person and estate of an incapacitated person.